No. [redacted] 10

IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

Appeal from the Supreme Court of Ohio

ALLIED STORES OF OHIO, INC.,
Appellant,

vs.

STANLEY J. BOWERS, TAX COMMISSIONER OF OHIO,
Appellee.

JURISDICTIONAL STATEMENT

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INDEX

Reference to opinions below	2
Statement of grounds of jurisdiction	2
Statutes and cases	3
Questions presented	4
Statement of case	4
A. Material facts	4
B. Stage at which the constitutional question was raised	4
The federal question is substantial	7
Conclusion	9
Appendix I—Order of Tax Commissioner	10
Appendix II—Entry of the Board of Tax Appeals	13
Appendix III—Entry of the Court of Appeals	15
Appendix IV—Opinion of the Supreme Court	16
Appendix V—Stipulation of facts	22
Appendix VI—Certificate	27

Table of Cases.

B. F. Goodrich Co. v. Peck, 161 Ohio St. 202, 118 N. E. (2d) 525	8
Charleston Federal S. & L. Assn. v. Alderson, 324 U. S. 182, 186 n. 1, 89 L. Ed. 857, 65 S. Ct. 624	7
General Cigar Co., Inc., v. Peck, 159 Ohio St. 152, 111 N. E. (2d) 265	7

International Steel & Iron Co. v. National Security Co., 297 U. S. 657, 662, 80 L. Ed. 961, 56 S. Ct. 619 7

Lawrence v. State Tax Commissioner, 286 U. S. 276, 76 L. Ed. 1102, 52 S. Ct. 556 7

Texts Cited

Title 57, Page's Ohio Revised Code Annotated, page 13 3

Vol. 6, Baldwin's Ohio Revised Code and Service, Title 57, page 5 3

Statutes Cited

28 U.S.C.A., Section 1275(2) 3

Revised Code of Ohio—

Section 5701.08 3

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Appellant,

vs.

STANLEY J. BOWERS, TAX COMMISSIONER OF OHIO,

Appellee.

JURISDICTIONAL STATEMENT

Appellant appeals from a judgment of the Supreme Court of Ohio, entered January 30, 1957, affirming the Court of Appeals, Cuyahoga county, Ohio. This statement is submitted to show that the Supreme Court of the United States has jurisdiction of the appeal, and that a substantial question is presented.

I

REFERENCE TO OPINIONS BELOW

The decision of the Board of Tax Appeals in this cause was journalized August 18, 1955, being Case No. 28440, on the board's docket (unreported, see Appendix II).

The decision of the Court of Appeals, Cuyahoga county, Ohio was journalized May 21, 1956, being Case No. 23663, on the court's docket (unreported, see Appendix III).

The decision of the Supreme Court of Ohio was journalized January 30, 1957, *Allied Stores of Ohio, Inc., v. Bowers*, 166 Ohio St. 116, 140 N. E. (2d) 411, (see Appendix IV). Rehearing denied February 20, 1957.

II

STATEMENT OF GROUNDS OF JURISDICTION

Proceedings leading to this appeal began when the Tax Commissioner of Ohio issued a preliminary assessment against appellant's storage merchandise. The commissioner affirmed the assessment on March 2, 1955 (see Appendix I).

Appellant appealed to the Board of Tax Appeals of Ohio, which held that although the appellant's merchandise was for storage only, the board had no jurisdiction to declare the taxing statute unconstitutional, and accordingly affirmed the assessment.

Subsequently, within time, appeal was filed with the Court of Appeals of Cuyahoga county, which sustained the statute as constitutional, and thereupon affirmed the board.

An appeal as of right was then taken to the Ohio Supreme Court and was allowed on October 3, 1956. On the same date the court also certified the constitutional ques-

tion as substantial and involving great general public interest. Pursuant to such appeal and certification, and upon briefs and argument, the Supreme Court affirmed the Court of Appeals. Notice of appeal to the Supreme Court of the United States was filed with the Supreme Court of Ohio on April 30, 1957.

III

STATUTES AND CASES

This is an appeal taken under 28 U.S.C.A., Section 1275 (2), and the cases believed to sustain the court's jurisdiction are the same as those cited in the jurisdictional statement submitted in *Youngstown Sheet and Tube Company v. Bowers*, companion to this case.

The challenged statute is Section 5701.08, Revised Code of Ohio, (Title 57, *Page's Ohio Revised Code Annotated*, page 13; Vol. 6, *Baldwin's Ohio Revised Code and Service*, Title 57, page 5), which provides in full:

> "(A) Personal property is 'used' within the meaning of 'used in business' when employed or utilized in connection with ordinary or special operations, when acquired or held as means or instruments for carrying on the business, when kept and maintained as a part of a plant capable of operation, whether actually in operation or not, *or when stored or kept on hand as material, parts, products, or merchandise; but merchandise or agricultural products belonging to a nonresident of this state is not used in business in this state if held in a storage warehouse for storage only.* Moneys, deposits, investments, accounts receivable, and prepaid items, and other taxable intangibles are 'used' when they or the avails thereof are being applied, or are intended to be applied, in the conduct of the business, whether in this state or elsewhere.
>
> "(B) 'Business' includes all enterprises conducted for gain, profit, or income and extends to personal service occupations." (Emphasis added)

IV

QUESTIONS PRESENTED

Does a statute deny residents of the state equal protection of laws under the Constitution of the United States by imposing a property tax upon residents' storage merchandise held for storage only, while at the same time excepting the storage merchandise of nonresidents when held for storage only?

V

STATEMENT OF CASE

A. Material Facts

The facts have been stipulated, see Appendix V.

Allied Stores of Ohio operates retail department stores in Akron, Cincinnati, Cleveland and Columbus. During 1953 and part of 1954 it maintained central warehouses in the above cities from which it supplied its various stores. The items stored were retail merchandise in finished form. No manufacturing or processing of the merchandise was carried on, and the merchandise was simply held in storage pending future disposition.

B. Stage at Which the Constitutional Question Was Raised

Appellant raised its constitutional objection in its notice of appeal to the Board of Tax Appeals of Ohio by assigning the following error:

> "2. Appellee erred in including, as taxable, agricultural products and merchandise belonging to appellant and held for storage only in this state for the reason that like property beyonging to a nonresident is

excepted from taxation by Section 5701.08 of the Revised Code, and same section (and related sections), purporting to levy a tax on agricultural products and merchandise belonging to residents of this state and held for storage only, is, therefore, unconstitutional and void in that it denies appellant the equal protection of the laws to which appellant is entitled under the Constitution of the state of Ohio and the Constitution of the United States."

The Board of Tax Appeals, being without jurisdiction to do otherwise, sustained the statute.

Upon the record before the board, including the above assignment of error, the appellant filed its notice of appeal with the Court of Appeals, citing as error:

"1. Section 5701.08, Revised Code, under which merchandise held by appellant for storage only was assessed by the Tax Commissioner, denies appellant equal protection of the laws and is therefore unconstitutional."

That court entered a paragraph opinion from which we quote:

"The positive statement in Section 5701.08, Revised Code, that 'products belonging to a non-resident of this state is not used in business in this state if held in a storage warehouse for storage only' is not an arbitrary or artificial classification and is within the right and power of the legislature to declare."

From this decision an appeal was taken to the Supreme Court of Ohio. The following errors were listed in the assignment of errors accompanying the notice of appeal:

"The Court of Appeals erred in the following respects:

"1. By holding that merchandise held by appellant in storage warehouses for storage only was used in business;

"2. By holding that Section 5701.08 of the Revised Code, on its face, does not deny residents equal protection of the laws;

"3. By holding that the assessment for tax of merchandise held by appellant, a domestic corporation, in storage warehouses for storage only did not deny appellant equal protection of the laws;

"4. By holding that Section 5701.08 of the Revised Code as applied to merchandise held by appellant, a domestic corporation, in storage warehouses for storage only so as to tax said merchandise did not deny appellant equal protection of the laws."

Wherefore, appellant requested that the Supreme Court of Ohio "allow this appeal on the federal and Ohio constitutional questions involved."

The Tax Commissioner on his behalf moved to dismiss the appeal:

"Comes now the appellee, Stanley J. Bowers, Tax Commissioner of Ohio, and moves this Court that the appeal as of right upon a constitutional question be dismissed for the reason that no substantial question under the Constitution of the State of Ohio or of the United States is there presented."

By journal entry dated October 3, 1956, the Ohio Supreme Court overruled the commissioner's motion and allowed the appeal of the constitutional question as of right. On the same date, it also journalized an entry certifying the question as substantial and of great public general interest. tion as substantial and of great general public interest.

The appeal having been allowed, the cause was briefed and argued to the court, and on January 30, 1957 decision was rendered sustaining the constitutionality of the statute. We quote from the court's syllabus:

"Although a legislative enactment may be invalid merely because certain limiting language therein makes

it repugnant to constitutional limitation, a court cannot cure such invalidity merely by striking such limiting language, where the elimination of such limiting language would substantially extend the operation of the legislative enactment beyond the scope contemplated by all the language of such legislative enactment."

On May 20, 1957, the Ohio Supreme Court journalized and made a part of the judgment and holding, its certificate specifying the grounds upon which its decision was based (see Appendix VI), *Charleston Federal Savings and Loan Association v. Alderson*, 324 U. S. 182, 186 n. 1, 89 L. Ed. 857, 65 S. Ct. 624; *International Steel & Iron Company v. National Surity Co.*, 297 U. S. 657, 662, 80 L. Ed. 961, 56 S. Ct. 619; and compare the Ohio Supreme Court's decision in this case with that of the Mississippi Supreme Court in *Lawrence v. State Tax Commissioner*, 286 U. S. 276, 76 L. Ed. 1102, 52 S. Ct. 556.

VI

THE FEDERAL QUESTION IS SUBSTANTIAL

Exeepting for a discussion of points peculiar to this appeal, appellant adopts here what has been said concerning the equal protection question in the jurisdictional statement submitted in *Youngstown Sheet and Tube Company v. Bowers.*

As noted in that statement, the Ohio Supreme Court construed the phrase "for storage only" as being applicable "where nothing is done in connection with such storage except what is necessary for the preservation of the stored merchandise or agricultural products," *General Cigar Co., Inc., v. Peck*, 159 Ohio St., 152, 111 N. E. (2d) 265.

In *The B. F. Goodrich Co. v. Peck*, 161 Ohio St. 202, 118 N. E. (2d) 525, the second paragraph of the court's syllabus held:

> "2. Property may be held 'for storage only, even though its owner intends at some subsequent time to sell it or to use it as manufacturing material. (*General Cigar Co., Inc. v. Peck, Tax Commr.*, 159 Ohio St., 152 followed.)"

Like the B. F. Goodrich Company, appellant operates retail merchandise outlets in various Ohio cities. And also like Goodrich, it stores merchandise in central warehouses from which the stores are supplied. In both cases, the merchandise is in finished form. The facts of this case are indistinguishable from those of *Goodrich*, but for one element: the residence of the taxpayer. Goodrich is a foreign corporation, whereas the appellant is a domestic. Hence, Goodrich was excepted from tax on its merchandise, while appellant has been required to pay the tax.

The two companies operate the same type of business, are in competition for the same general market, and store the same types of merchandise for the same purpose. No distinction can be drawn between the businesses or the business merchandise held in storage. The single distinction upon which the tax has been predicated is the taxpayers' residence, and that distinction operates not only against appellant but against all Ohio residents doing business in competition with nonresidents.

Finally, this appeal raises the question whether a state legislature has broader powers of classification where its own residents are concerned, than where nonresidents are. In sum, may a state subject its own residents to a greater degree discrimination than might ordinarily be permitted against nonresidents?

For the above reasons and those discussed in the jurisdictional statement filed in Youngstown Sheet and Tube Company v. Bowers, the appellant here concludes that the equal protection question is substantial, and particularly so in view of the Board of Tax Appeals holding that the appellant's merchandise was for storage only, and the Ohio Supreme Court's assumption that even though the statute be unconstitutional, it must nevertheless be sustained.

VII

CONCLUSION

Appellant concludes that this court has jurisdiction of the appeal; that the constitutional question was timely raised; that the Ohio Supreme Court allowed the appeal on the constitutional question and passed upon the question; and that the question involved is substantial.

Alternatively, should the court determine that it does not have jurisdiction, certiorari should be granted.

Respectfully submitted,

CARLTON S. DARGUSCH, SR.,
Attorney for Appellant.

APPENDIX I

Order of Tax Commissioner

(Dated March 2, 1955.)

This proceeding being the application of Allied Stores of Ohio, Inc., an inter-county corporation, Cleveland, Ohio, for review and redetermination of an increased tangible personal property tax assessment for the year 1954, after being duly heard, came on to be considered.

The applicant herein, a domestic corporation, in making its inter-county return of taxable property for the year 1954, eliminated from the average value of its merchandise inventories reported therein an amount representing the value of merchandise held by it in storage warehouses for storage only. In support of the value so eliminated, the applicant submitted with its return a separate schedule setting forth the monthly values of such stored property. The applicant also filed a claim for deduction from the book value of its furniture, fixtures, and equipment taxable in Schedule 4.

In passing upon the applicant's claim for deduction from the book value of its furniture, fixtures, and equipment, which claim was allowed in full, the separate schedule submitted by the applicant, with respect to merchandise in storage, was construed as a claim for deduction and the average monthly value reflected in such schedule was deducted from the average value of taxable merchandise inventories as reported by the applicant. This action resulted in a duplicate reduction for such property inasmuch as the applicant itself had eliminated the value of merchandise in storage from the average value of taxable inventories listed in Schedule 3A. Subsequently, the average value of merchandise held in storage for storage only was

added back to the taxable value listed in Schedule 3A and an amended preliminary assessment certificate issued reflecting such action. The applicant filed this application for review and redetermination therefrom, contending that the statutes purported to levy a tax on merchandise and agricultural products of residents of this state held in storage warehouses for storage only were unconstitutional and void, in that, identical property of a nonresident is excepted from taxation under the provisions of Section 5701.08, Revised Code, as construed in the case of The B. F. Goodrich Co. v. Peck, 161 Ohio St., 202.

Being fully advised in the premises, the Tax Commissioner finds that as an administrative official he is without authority to pass on the question of the constitutionality of the statutes here involved, such being the province of the courts alone. Cincinnati, W. & Z. R. Co. v. Clinton County, 1 Ohio St., 77; State ex rel. Davis v. Hildebrant, 94 Ohio St., 154, 114 N. E., 55. Furthermore, the Tax Commissioner finds that as an administrative official, he must proceed in accordance with the terms and provisions of the statutes with which he is concerned with the assumption of their constitutionality. East Ohio Gas Co. v. Public Utilities Comm., 137 Ohio St., 225, 28 N. E. 2d, 599; Argo v. Kaiser, 66 O. L. Abs., 538, 118 N. E. 2d, 162. Thus, the Tax Commissioner finds no error in the assessment as made insofar as it purports to assess merchandise and agricultural products of the applicant held in storage warehouses for storage only since such property is subject to taxation under the provisions of Sections 5701.08, 5709.01, 5711.22 and correlated sections of the Revised Code. However, the Tax Commissioner finds that because of the duplicate reduction in applicant's taxable inventories hereinbefore explained, that the true average value of merchandise in

storage has not as yet been assessed. Taking such fact into account and making proper allowance in applicant's taxable inventories as provided in Rule No. 222 of the Department of Taxation, the Tax Commissioner finds the true average value of applicant's inventories to be $6,784,927.00 for the year 1954.

The Tax Commissioner, being further advised, finds that the applicant's claim for deduction from the book value of its furniture, fixtures, and equipment was not well taken and that such claim should be, and the same hereby is, denied in its entirety. The Tax Commissioner also finds that applicant's net taxable credits and money and other taxable intangibles as listed were deficient as disclosed upon audit and that corrections therein are in order.

Giving effect to the findings made herein with respect to property of the applicant taxable in Schedules 4, 9, and 10, the Tax Commissioner finds that the true value of property taxable in such schedules for the year 1954 is as follows:

Schedule	True Value
4	$2,645,009.00
9	1,935,390.00
10	592,400.00

It is, therefore, the order of the Tax Commissioner that a corrected assessment certificate be issued in accordance with the findings made in this journal entry. Such certificate shall be final with respect to the assessment of all taxable property listed in the applicant's return.

APPENDIX II

Entry of the Board of Tax Appeals

(Dated August 18, 1955.)

This appeal is from a final order of the Tax Commissioner made on March 2, 1955. In and by this order, issued upon an application for review and redetermination, the commissioner made an increased personal property tax assessment against the taxpayer for the year 1954.

The cause now comes on for further and final consideration upon the commissioner's transcript, appellant's notice of appeal, the record of a hearing had before this board on June 1, 1955, a stipulation of facts, certain exhibits and briefs of counsel.

Appellant's counsel, in the course of his opening statement, succinctly states the taxpayer's complaint, and the question that is now before this board. He says:

> "In the notice of appeal we raise two questions, one of which we do not desire to present, as we wish to present but a single question to the Board in the Allied Stores case. The matter upon which we will go forward is that which involves the taxability of the storage merchandise held by taxpayer, a domestic corporation, in storage warehouses for storage only within the meaning of the statute.
>
> "It is our contention that the statutes of Ohio which purport to levy a tax on the storage inventory of this taxpayer discriminates against it and deny taxpayer the equal protection of the laws under both the state and Federal constitutions in that property of the same kind when held by a non resident is excepted from taxation under the so-called Goodrich case. (Goodrich Company v. Peck, 161 O. S. 202).

"We have raised a question also, as I indicated, of the value of furniture and fixtures which is a question of fact which we do not intend to go forward with, and we will present only the legal question that is involved in the storage merchandise.

"I think there are two problems there. One, whether the merchandise in question is held in the storage warehouse for storage only within the meaning of the statute; and, secondly, whether the statutes which purport to levy a tax on that property are unconstitutional in that they deny taxpayer the equal protection of the laws."

It, therefore, appears that appellant abandons all other compiaints, save the two questions noted.

The only real point of difference between the present case and that of the Goodrich case, supra, lies in that appellant is a domestic, or an Ohio corporation, engaged exclusively in merchandising, while The Goodrich Company is a nonresident manufacturing corporation. After again re-examining the decisions of the court in General Cigar Co., Inc., v. Peck, 159 O. S., 152, and Goodrich Co. v. Peck, supra, the Board of Tax Appeals is of the opinion that appellant's first problem must be answered in the affirmative.

Since appellant's principal query concerns a matter of discrimination and the constitutionality of Revised Code Section 5701.08 (General Code Section 5325-1), matters over which this board is without jurisdiction to consider, this board can do nothing else but to affirm the Tax Commissioner's order as made, which is hereby accordingly done.

APPENDIX III

Entry of the Court of Appeals of Cuyahoga County, Ohio.

Judgment affirmed. The property, under the agreed facts, was "kept on hand—as merchandise" and "held as means—for carrying on the business" of the appellant and was thus "used in business" in the state of Ohio (Sec. 5701.08 R. C.) and consequently came within the purview of Section 5709.01 R. C. and was taxable as "personal property located and used in business in that state." The positive statement in Section 5701.08 R. C. that "products belonging to a nonresident of this state is not used in business in this state if held in storage warehouses for storage only" is not an arbitrary or artificial classification and is within the right and power of the legislature to declare. See City of Xenia v. Schmidt, 101 O. S. 437; Travellers' Ins. Co. v. Connecticut, 185 U. S. 364. Goodrich Co. v. Peck, 161 O. S. 202, in effect so holds. We decide, therefore, that the decision of the Board of Tax Appeals was neither unreasonable nor unlawful. Exceptions. Order see journal.

APPENDIX IV

Opinion of the Supreme Court of Ohio

ALLIED STORES OF OHIO, INC., APPELLANT, *v.* BOWERS, TAX COMMR., APPELLEE.

Although a legislative enactment may be invalid merely because certain limiting language therein makes it repugnant to constitutional limitations, a court cannot cure such invalidity merely by striking such limiting language, where the elimination of such limiting language would substantially extend the operation of the legislative enactment beyond the scope contemplated by all the language of such legislative enactment.

(No. 34926—Decided January 30, 1957.)

Appeal from the Court of Appeals for Cuyahoga County.

Allied Store of Ohio, Inc., herein referred to as the taxpayer, is an Ohio corporation. In an appeal to the Board of Tax Appeals from a final order of the Tax Commissioner, the taxpayer contended that the Tax Commissioner had erroneously assessed for taxation for the year 1954 certain "merchandise * * * held in a storage warehouse for storage only" within the meaning of those words as used in Section 5701.08, Revised Code, in effect prior to September 30, 1955, and that the statutes of Ohio were unconstitutional to the extent that they purported to levy a tax on such property not "belonging to a nonresident of" Ohio, in that they denied a resident such as the taxpayer the protection of the laws equal to that enjoyed by a nonresident. See *Little v. Smith, Atty. Genl.*, 124 Kan., 237, 257 P., 959, 57 A. L. R., 100; *Colgate v. Harvey*, 297 U. S., 404.

Section 5709.01, Revised Code, reads so far as pertinent:

"* * * All personal property located and used in business in this state * * * are subject to taxation, regardless of the residence of the owners thereof."

Section 5701.08, Revised Code, prior to September 30, 1955, read so far as pertinent:

"(A) Personal property is 'used' within the meaning of 'used in business' * * * when acquired or held as means or instruments for carrying on the business * * * or when stored or kept on hand as material, parts, products, or merchandise; but merchandise or agricultural products belonging to a nonresident of this state is [are] not used in business in this state if held in a storage warehouse for storage only."

In its final entry, the Board of Tax Appeals stated in part:

"The only real point of difference between the present case and that of the *Goodrich case*, * * * [161 Ohio St., 202, 118 N. E. (2d), 525] lies in that appellant is a domestic, or an Ohio corporation, engaged exclusively in merchandising, while the Goodrich company is a nonresident manufacturing corporation. * * *

"Since appellant's principal query concerns a matter of discrimination and the constitutionality of Revised Code Section 5701.08 * * *, matters over which this board is without jurisdiction to consider, this board can do nothing else but to affirm the Tax Commissioner's order as made * * *."

In affirming the decision of the Board of Tax Appeals, the Court of Appeals stated in part:

"The positive statement in Section 5701.08, Revised Code, that 'products belonging to a nonresident of this state is not used in business in this state if held in

a storage warehouse for storage only, is not an arbitrary or artificial classification and is within the right and power of the Legislature to declare. See *City of Xenia v. Schmidt*, 101 Ohio St., 437 [130 N. E., 24]; *Travelers' Ins. Co. v. Connecticut*, 185 U. S., 364. *Goodrich Co. v. Peck*, 161 Ohio St., 202 [118 N. E. (2d), 525], in effect so holds."

The cause is now before this court on appeal from the judgment of the Court of Appeals as a case involving a debatable constitutional question and pursuant to allowance of a motion to certify the record.

Mr. Carlton S. Dargusch, Sr., and *Mr. Jack H. Bertsch*, for appellant.

Mr. C. William O'Neill, attorney general, *Mr. Larry Snyder* and *Mr. Kiehner Johnson*, for appellee.

TAFT, J. Ordinarily, a constitutional question will not be considered unless it is necessary to consider such constitutional question in deciding the case before the court. In our opinion, it is not necessary to consider the constitutional question raised by the taxpayer in the instant case because, if its contention with regard to that question is sound, it necessarily leads to the conclusion that the entire proviso in subdivision (A) of Section 5701.08, which read, "but merchandise or agricultural products belonging to a nonresident of this state is not used in business in this state if held in a storage warehouse for storage only," was void and should be stricken. That being so, it is apparent that any of taxpayer's "merchandise • • • held in a storage warehouse for storage only" would be taxable because described by the preceding words remaining in the statute and reading, "stored • • • as • • • merchandise."

Of course, if only that portion of the proviso after the semicolon in subdivision (A) of Section 5701.08, which read, "belonging to a nonresident of this state," is stricken, the discrimination between residents and nonresidents would be eliminated; and then the proviso would prevent taxation of the taxpayer's "merchandise • • • held in a storage warehouse for storage only." However, the question remains as to the power of this court to effect that result by striking only that portion of the proviso. In other words, if we assume that the taxpayer's contention that the discrimination beween nonresidents and residents contemplated by the words of the proviso would deny a resident the equal protection of the laws and must be eliminated, has this court the power to eliminate that discrimination by striking only that portion of the proviso reading, "belonging to a nonresident of this state"? If it does not have that power, the whole proviso must be stricken in order to eliminate that discrimination and then the taxpayer would obviously have nothing upon which to base its claim for the relief which it seeks.

Although a legislative enactment may be invalid merely because certain limiting language therein makes it repugnant to constitutional limitations, a court cannot cure such invalidity merely by striking such limiting language, if the elimination of such limiting language would substantially extend the operation of the legislative enactment beyond the scope contemplated by all the language of such legislative enactment.

In the opinion by Welch, J., in *State, ex rel. McNeal, v. Dombaugh, Clerk*, 20 Ohio St., 167, 174, it is said:

"It is by a mere figure of speech that we say an unconstitutional provision of a statute is 'stricken out.' For all the purposes of construction it is to be regarded as part

of the act. The *meaning* of the Legislature must be gathered from all they have said, as well from that which is ineffective for want of power, as from that which is authorized by law."

In *State, ex rel. Wilmot, v. Buckley,* 60 Ohio St., 273, 296, 54 N. E., 272, it is said in the opinion by Burket, J.:

"* * * the court has no lawmaking power, and cannot extend a statute over territory from which it is excluded by the General Assembly. A court can hold a whole act unconstitutional because it is not broad enough * * *; but it cannot extend an act which is too narrow, so as to take in territory which was left out by the General Assembly."

In 11 American Jurisprudence, 855, Section 161, it is said:

"One important class of cases in which questions as to the severability of valid and invalid portions of an act and the determination of the legislative intent are involved consists of statutes containing invalid exceptions or provisos. The general rule is that if such a proviso operates to limit the scope of the act in such a manner that by striking out the proviso, the remainder of the statute would have a broader scope either as to subject or territory, then the whole act is invalid, because such extended operation would not be in accordance with the legislative intent."

See also *Connolly v. Union Sewer Pipe Co.,* 184 U. S., 540, 46 L. Ed., 679, 22 S. Ct., 431; *State, ex rel. Wilson, Solr., v. Lewis, Aud.,* 74 Ohio St., 403, 78 N. E., 523; *State, ex rel. Squire, Supt. of Banks, v. City of Cleveland,* 150 Ohio St., 303, 336, 82 N. E. (2d), 709; *State, ex rel. English, v. Industrial Commission,* 160 Ohio St., 215, 217 *et seq.,* 115 N. E. (2d), 395; but see *State, ex rel., v. Baker,* 55 Ohio St., 1, 44 N. E., 516.

In the instant case, we do not have a legislative situation where the proviso was merely enacted as a part of a statute defining the objects to be subject to taxation. In such an instance, striking the words "belonging to a nonresident of this state" would merely prevent the tax from being extended as far as the General Assembly intended. By doing that, this court would not be extending the operation of the statute so as to cover subjects or objects that the General Assembly did not intend to cover.

However, in the instant case, these taxing statutes, as originally enacted in 1931 (114 Ohio Laws, 714), did not contain the proviso which the taxpayer must necessarily rely upon for any relief *after* it has had this court remove from it the portion which it contends was invalid. The proviso was added by an amendment to the statute in 1933 (115 Ohio Laws, 548). See annotation, 66 A. L. R., 1483. Cf. *Frost v. Corporation Commission of Oklahoma*, 278 U. S., 515, 525, 73 L. Ed., 483, 49 S. Ct., 235; *Reitz v. Mealey, Commr.*, 314 U. S. 33, 38, 39, 86 L. Ed., 21, 62 S. Ct., 24; 11 American Jurisprudence, 841, 856, 857, Sections 154, 161. Prior to that amendment, the General Assembly had expressed an intention to tax any property "when stored or kept on hand as * * * merchandise." The amendment dealt with a withdrawal of some of that property from such taxation. The General Assembly provided only for withdrawal of "merchandise or agricultural products belonging to a nonresident." It did not provide for anything with respect to such merchandise or agricultural products belonging to a resident. If this court merely strikes the words "belonging to a nonresident of this state," the effect of that would be to provide for such a withdrawal of "merchandise or agricultural products" belonging to a resident; and it would thereby be substan-

tially *extending* the operation of the legislative enactment beyond the scope contemplated by the legislative language. As the taxpayer recognizes in its reply brief, its contention is that "the *failure* of the Legislature *to extend* the exception to residents is" what was unconstitutional. By merely striking the words "belonging to a nonresident of this state," this court in effect would be exercising a legislative power which it does not have.

Therefore, if we assume that the proviso was unconstitutional and invalid because it denied to residents a protection of the laws equal to that enjoyed by nonresidents, it would be necessary to strike the whole proviso to eliminate that invalidity. If that is done, the taxpayer would not be entitled to any relief. It follows that the judgment of the Court of Appeals must be affirmed.

Judgment affirmed.

Stewart, Bell, Matthias and Herbert, JJ., concur.

Weygandt, C. J., and Zimmerman, J., concur in the judgment.

APPENDIX V

Stipulation of Facts

[Filed June 1, 1955.]

It is stipulated and agreed by and between counsel for the respective parties hereto that the following may be considered and accepted as the facts for all purposes pertinent to the consideration and decision of the above case:

1. Allied Stores of Ohio, Inc., appellant herein, is a corporation organized and existing under and by virtue of the laws of the state of Ohio with its principal office at Euclid and 13th street, Cleveland, Ohio.

2. Appellant operates retail department stores and maintains warehouses in the cities of Akron, known as The A.

Polsky Company; Cincinnati, known as The Rollman and Sons Co.; Cleveland, known as The Sterling Lindner Davis Company; and Columbus, known as Morehouse-Fashion Co. See Exhibits A, B, C, and D, attached hereto and made a part hereof.

3. The tax year in question is 1954, and the property covered thereby was listed as of January 31, 1954, except inventory, including inventory stored in storage warehouses, which was averaged for the twelve months covered by the fiscal year, February 1, 1953, to January 31, 1954, and such inventory including inventory stored in storage warehouses was assessed by appellee as taxable.

4. The warehouses in which inventory was stored by appellant were as follows:

(1) The A. Polsky Company warehouse in Akron is a private warehouse leased, operated and controlled by appellant. Exhibit A supra.

(2) The Rollman and Sons Co. warehouses in Cincinnati are private warehouses leased, operated and controlled by appellant. Exhibit B supra.

(3) The Sterling Lindner Davis warehouse in Cleveland is a private warehouse owned, operated and controlled by appellant. Exhibit C supra.

(4) The Morehouse-Fashion Co. warehouse in Columbus is a private warehouse leased, operated and controlled by appellant. Exhibit D supra.

5. The dollar value of the inventory carried in each of the foregoing warehouses is set forth in Exhibit E, attached hereto and made a part hereof, and is shown for the fiscal year beginning February 1, 1953 and ending January 31, 1954. All of said property was owned by the appellant.

6. The dollar value of the inventory carried in The A. Polsky Company warehouse in Akron was divided into two major groups as follows:

County: Summit
Taxing District: Akron

		Group 1	Group 2
January, 1954	$ 387,115	349,178	37,937
February, 1953	378,417	341,332	37,085
March, 1953	389,929	351,716	38,213
April, 1953	417,284	376,390	40,894
May, 1953	494,263	445,825	48,438
June, 1953	367,460	331,449	36,011
July, 1953	243,136	219,309	23,827
August, 1953	239,966	216,449	23,517
September, 1953	239,988	216,469	23,519
October, 1953	187,533	169,155	18,378
November, 1953	267,046	240,876	26,170
December, 1953	198,826	179,341	19,485
Total Monthly Inventory	3,810,963	3,437,489	373,474
Average Monthly Inventory Value	317,580	286,457	31,123

7. The dollar value of the inventory carried in The Rollman and Sons Co. warehouse in Cincinnati consisted entirely of group 1 type merchandise, as follows:

County: Hamilton
Taxing District: Cincinnati

		Group 1
January, 1954	$ 275,830	275,830
February, 1953	283,380	283,380
March, 1953	283,390	283,390
April, 1953	263,898	263,898
May, 1953	236,180	236,180
June, 1953	186,090	186,090
July, 1953	254,580	254,580
August, 1953	297,130	297,130
September, 1953	326,630	326,630
October, 1953	333,410	333,410
November, 1953	314,900	314,900
December, 1953	265,950	265,950
Total Monthly Inventory	3,321,368	3,321,368
Average Monthly Inventory Value	276,780	276,780

Note: Items representing group 2 were warehoused within the retail store.

8. The dollar value of the inventory carried in The Sterling Lindner Davis Company warehouse in Cleveland was divided into two major groups, as follows:

County: Cuyahoga
Taxing District: Cleveland

		Group 1	Group 2
January, 1954	$ 320,668	286,228	34,440
February, 1953	364,299	325,173	39,126
March, 1953	397,766	355,046	42,720
April, 1953	397,590	354,889	42,701
May, 1953	411,818	367,589	44,229
June, 1953	393,720	351,434	42,286
July, 1953	381,860	340,848	41,012
August, 1953	351,424	313,681	37,743
September, 1953	355,689	317,488	38,201
October, 1953	430,625	384,376	46,249
November, 1953	419,682	374,608	45,074
December, 1953	356,778	318,460	38,318
Total Monthly Inventory	4,581,919	4,089,820	492,099
Average Monthly Inventory Value	381,826	340,818	41,008

9. The dollar value of the inventory carried in the Morehouse-Fashion Co. warehouse in Columbus was divided into two major groups, as follows:

County: Franklin
Taxing District: Columbus

		Group 1	Group 2
January, 1954	$ 150,453	127,885	22,568
February, 1953	170,263	144,724	25,539
March, 1953	168,855	143,527	25,328
April, 1953	185,847	148,678	37,169
May, 1953	187,934	150,347	37,586
June, 1953	168,370	134,696	33,674
July, 1953	171,660	145,911	25,749
August, 1953	179,229	152,345	26,884

		Group 1	Group 2
September, 1953	187,929	159,740	28,189
October, 1953	203,896	163,117	40,779
November, 1953	189,647	113,788	75,859
December, 1953	159,065	103,386	55,679
Total Monthly Inventory	2,123,148	1,688,144	435,004
Total Monthly Inventory Value	176,929	140,679	36,250

10. Group 1 in the A. Polsky, Rollman, Sterling Lindner Davis, and Morehouse-Fashion warehouses was composed of the following items:

Infants furniture, kitchen furniture, bulk housewares (such as unpainted furniture, step ladders, etc.), stoves, refrigerators, sinks, cabinets, dishwashers, washing machines and dryers, mattresses, television, radios, record players, floor coverings (such as linoleum, carpets and rugs), prepackaged sets of dinnerware, bulk toys, such as bicycles, gym sets, etc.; living room furniture, dining and bedroom furniture and miscellaneous casual furniture.

The items covered by Group 1 are those which normally would be sold to customers in the retail store from floor samples maintained therein and with respect to which sales deliveries were normally made to the customer from warehouse stocks.

11. Group 2 in the A. Polsky, Sterling Lindner Davis, and Morehouse-Fashion warehouses was composed of the following items:

Luggage, sporting goods (such as golf equipment, fishing equipment, etc.), pillows and blankets, miscellaneous wrought iron novelties such as are normally sold in the stationery department of a department store; paints, some miscellaneous sizes of small rugs, sanitary goods, toilet paper and soaps and venetian blinds.

The items covered by Group 2 are those which normally would be sold to customers in the retail store and delivered to the customer from stocks of merchandise maintained in the retail store and transferred from the warehouse to the retail store for that purpose.

12. All the items of merchandise stored in the several warehouses of appellant were finished products in condition for sale to the ultimate consumer. The items stored, being held (a) for ultimate distribution to the retail department stores of appellant (Group 2), or (b) ultimate delivery to customer as the result of sales made to customers at the retail stores of appellant (Group 1). No sales were made to customers as the result of sales made to customers at the dise. None of the items stored in the said warehouses were manufactured by appellant, but all were purchased from suppliers located both within and without Ohio.

13. The foregoing constitutes all of the facts to be offered by either of the parties hereto in these proceedings.

C. William O'Neill,
Attorney General, State of Ohio,
Larry H. Snyder,
Assistant Attorney General, State of Ohio,
Attorneys for the Tax Commissioner, State of Ohio.
Carlton S. Dargusch, Sr.,
Attorney for Allied Stores of Ohio, Inc.

APPENDIX VI

SUPREME COURT OF OHIO

ALLIED STORES OF OHIO, INC., APPELLANT, VS. STANLEY J. BOWERS, TAX COMMISSIONER OF OHIO, APPELLEE.

Certificate

On motion of the appellant, Allied Stores of Ohio, Inc., it is ordered to be certified and made a part of the record

of the proceedings and of the judgment of the court in this cause that by its appeal from the Court of Appeals of Cuyahoga county, the appellant placed in issue the constitutionality of formed Section 5701.08, Revised Code of Ohio, contending that the said section as enacted and as construed and applied denied appellant (a resident corporation) equal protection of the laws in violation of Section 1of the Fourteenth Amendment of the United States Constitution for the reason that it taxed storages only of resident corporations while excepting the same property of nonresident corporations, and that the court found, pursuant to appeal, briefs and oral argument of counsel, that despite such alleged discrimination it was without jurisdiction to provide relief; that to do so would result in amending the section to include appellant within the exception; that therefore the section must stand; that so standing and so construed the section was not repugnant to the United States Constitution or if repugnant, has nevertheless to be sustained in accordance with the intent of the General Assembly, even though discriminatory; and that this holding was appropriate and necessary to the court's decision.

Witness the Honorable Supreme Court of Ohio, this 20 day of May, 1957.

Supreme Court of Ohio
Carl V. Weygandt
Chief Justice of the Supreme Court of Ohio.